No. 87-1731

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CARSON PIRIE SCOTT & CO.
Petitioner,
v.

WILLIAM M. LACEY,
Respondent.

PETITIONER'S REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The importance and substantiality of the questions presented have not been denied by the respondent. Neither has he disputed that the questions of law involving the evidentiary burden of proof in cases arising under the ADEA now pending from the Third Circuit before this Court in Harbison-Walker Refractories v. Brieck, cert. granted, 56 U.S.L.W. 3647 (March 21, 1988) (No. 87-271) and Westinghouse Electric Corp. v. Bhaya, 832 F.2d 258 (3d Cir. 1987), cert. filed, 56 U.S.L.W. 3627 (Feb. 29, 1987)(No. 87-1448), directly bear on whether the cor-

rect legal standard was applied in this case. Noticeably absent from respondent's presentation is any reference to the questionable evidentiary standard formulated in the Bhaya case, which the Third Circuit expressly ruled was controlling the legal outcome of the instant case.

Respondent further contends that petitioner waived its arguments concerning front pay and the duty to mitigate damages for failure to object at trial. Opp. at 13. These same arguments were raised by respondent in the court of appeals below, fully briefed and rejected, as the Third Circuit confronted each of these questions. None of the concrete issues would have been reached if the Third Circuit believed the respondent's argument that a waiver had occurred.[1]

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[1]To the extent respondent suggests that the issues here have been waived, he should have cross-petitioned for a writ of certiorari on these issues. Because he has not, the waiver issues are not now before the Court. As to the merits of respondent's waiver argument, Carson presented its

(continued...)

I. RESPONDENT'S FAILURE TO CONFRONT THE THIRD CIRCUIT'S DEPARTURE FROM THE DECISIONS OF THIS COURT, AS EVIDENCED BY THE GRANT OF CERTIORARI IN HARBISON-WALKER REFRACTORIES, HIGHLIGHTS THE CONFLICT THAT MUST BE DECIDED IN THIS CASE

In its Petition, Carson fully set forth the important evidentiary issue that will be resolved by the Court in Harbison-Walker Refractories v. Brieck, 624 F.Supp. 363 (W.D.Pa. 1985), rev'd mem. 822 F.2d 52 (3d Cir. 1987), cert. granted, 56 U.S.L.W. 3647 (March 21, 1988)(No. 87-271), namely, whether a plaintiff who alleges intentional discrimination can survive summary judgment

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[1](...continued)
proposed jury instructions to the trial judge involving front pay, mitigation and evidentiary burden, but they were rejected. Defendants Instructions Nos. 5-10, see Appellants Reply Brief at 20-25, were rejected by the trial court. (J.A. 436-37, 447-48). In the Third Circuit, by "obtaining a ruling on a proposed instruction a litigant has satisfied Rule 51." Bowley v. Stotler & Co., 751 F.2d 641, 646 (3d Cir. 1985). The colloquy between the trial judge and counsel also acts to preserve the party's position. Transcontinental Leasing v. Michigan Natl. Bank, 738 F.2d 163, 167 (6th Cir. 1984).

merely by questioning his employer's business judgment, without presenting any affirmative evidence that his employer's decision was in fact motivated by an intent to discriminate. The Third Circuit answered that a plaintiff could and in the case of Bhaya v. Westinghouse Electric Corp., 832 F.2d 258 (3d Cir. 1987), cert. filed, 56 U.S.L.W. 3627 (February 29, 1988)(No. 87-1448), determined that an inference of discrimination is, in fact, established by a prima facie case. This permits a jury to disregard an employer's articulated non-discriminatory reason for discharge. Bhaya was specifically relied upon by the court below to deny the appeal. Pet. A-6.

Respondent has clearly refused to discuss the impact and importance the two cases now before the Court have under the ADEA. By only referring to the Title VII burden elucidated in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), respondent undermines his position

since the instant case arises under the ADEA and this Court has repeatedly recognized that the two statutes have significant remedial and procedural differences. Lorillard v. Pons, 434 U.S. 573, 584 (1978). Moreover, petitioner presented the Third Circuit with these very differences and the lucid construction of the weaker presumption of bias in age cases, as explained by Judge Adams in Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1401 (3d Cir. 1984); Pet. at 33-35.

The court below chose not to recognize the distinction this Court has repeatedly cautioned should be made between the two statutes. The statutes do not become identical by simply not addressing how the burden of proof in ADEA cases should logically follow Title VII laws or explaining how an "inference of discrimination" is created from an ADEA prima facie case, but "destroyed" in a Title VII case through a satisfactory employer explanation as respondent and

the Third Circuit have chosen to do.

Respondent can only illustrate that he was not required to present rebuttal evidence, but could rely on his case in chief, cross-examination of defense witnesses, closing argument and jury instructions to meet this ultimate burden of proof. Opp. at 16. He cites the Third Circuit case of Chippollini v. Spencer Gifts, 814 F.2d 893, 898 (3d Cir. 1987), dismissed, 108 S.Ct. 26 (1987) (Rule 53), and the early summary judgment case of Grecco v. Spang & Co., 527 F.Supp. 978 (W.D.Pa. 1981), later decision, 530 F.Supp. 782 (W.D.Pa. 1983), which ruled that an issue of fact is created by the prima facie case which must be resolved by the trier of fact. Again, these issues will be resolved in Harbison-Walker Refractories v. Brieck. However, the Third Circuit never contended in its decision in the instant case that here was a special situation where the cross-examination of witnesses was enough to meet the plaintiff's ultimate bur-

den of proof that his age was the determinitive factor in the decision to discharge him.[2]

In the case at bar, defendant presented direct evidence that it was losing money in Pittsburgh. Respondent Lacey was supposed to be Carson's leading productive salesman in the territory whose work would create the volume necessary for Carson to earn a profit. Lacey, however, could never produce enough volume in Pittsburgh to justify Carson's presence in Pittsburgh and Carson's sales managers determined that after attempting to help him in 1979, 1980 and

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[2]Respondent indicates that counsel for petitioner made a concession at trial in a colloquy with the trial judge, after the close of the evidence, that there is no absolute requirement for presentation of rebuttal evidence. Opp. at 17 n.2. But the record shows in the next sentence, counsel for petitioner stated: "But the plaintiff will not get to the jury merely because he has a bare bones prima facie case. The case which he put in prior to the time he rested had better go beyond a bare bones prima facie case and had better contain evidence." (J.A. 432).

1981 (J.A. 503, 505-7),[3] Lacey never would meet the company's required level of sales because Lacey felt that the national sales program was bad policy. (J.A. 527).

The critical fact omitted from respondent's case in chief and not disputed in his cross-examination of defendants' witnesses, is that Lacey's sales were simply not enough to make a profit. A business simply cannot afford to maintain employees who are not

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[3]It is undisputed that in 1979 Carson sent a new district manager to Pittsburgh to improve its Pittsburgh territory sales (J.A. 204-05), that Carson assigned a special contracts salesman to Pittsburgh to service some current accounts to permit Lacey to concentrate on new sources of demand (J.A. 199), and that the National Vice President made special visits with Lacey to his accounts in the Fall of 1980 to evaluate Lacey's sales efforts and presentations. (J.A. 333-35, 523). This led to the unprecedented letter of January 22, 1981, by Broderick, memorializing their meeting to Lacey that he must comply with Carson's sales program. Pl.Ex. 8. Broderick testified the letter was "emphatic. I wanted it to be understood that this was very important that these procedures that we discussed were followed as far as the dealers were mentioned to call on, the amount of placement of samples, etc." (J.A. 392). "I would say it was a situation of advisement." (J.A. 401).

productive. Congress never intended for the Age Act to supplant an employer's ability to ensure its employees earn their keep. It "was not intended to 'diminish traditional management prerogatives,'" Burdine, 450 U.S. at 259 (quoting United Steelworkers of America v. Weber, 443 U.S. 913, 207 (1979). They were to be "left undisturbed to the greatest extent possible." H.R. Rep. No. 914, 88th Cong., 2d Sess., Part 2 at 29 (1963).

In the case at bar, all the evidence respondent could introduce only shows he knew how to sell carpet and could sell at least $1 million per year. He never established that during his five year tenure with Carson he sold enough carpet in Pittsburgh for a profit to be made, the articulated business reason for his discharge. Having failed to introduce evidence in rebuttal that Carson's actual monetary losses were not its true reasons, but were a pretext for age discrimination against him,

he failed to meet his ultimate burden of persuasion. Carson should have been granted a directed verdict.

Caselaw developed in the Third Circuit has, however, permitted the jury to infer discrimination solely from the plaintiff's prima facie case setting forth his simply being a member of the protected class. This end run around the three-part burden of proof established by the Court in Burdine departs from Congress' intention not to bar management from making hard business decisions regarding its employees. As set out in the petition, this case truly represents a situation where a business to survive must be allowed to restructure itself on the basis of its profits and losses.

Here, respondent introduced no evidence that petitioner was motivated by an intent to discriminate. "Merely casting doubt on the employer's articulated reason does not suffice to meet the plaintiff's burden of demonstrating discriminatory intent." White

v. Valhally, 732 F.2d 1037, 1043 (1st Cir. 1984), cert. denied, 469 U.S. 933 (1984).[4]

> Decisions [as to the relative capabilities of workers] will always involve a number of subjective factors, and disappointed candidates cannot expect a federal judge [or jury] to intervene simply in the hope that he or she will evaluate the factors differently. The ADEA only requires the intervention of the federal judiciary when age is a determining factor in the decision.

Parker v. Federal Nat'l Mortgage Assn., 741 F.2d 975, 981 (7th Cir. 1984).

II. RESPONDENTS' CHARACTERIZATION OF THE RECORD WITHOUT REFERENCE TO THE EMPLOYER'S ARTICULATED REASONS FOR DISCHARGE HIGHLIGHT THE NEED FOR THE EVIDENTIARY BURDEN IN AGE CASES TO BE CLARIFIED

Respondent places great weight on the

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[4]Respondent contends that since Mr. Burden, who was already working for Carson at the time Lacey was discharged, was on salary versus commission this saved money. Opp. at 21. However, respondent never proved what the differential, if any, was. Therefore, the contention is speculative. Moreover, Lacey admitted that Burden was a more experienced carpet salesman (J.A. 66-67). See Burdine, 450 U.S. at 256 (defendant must prove those he hired were better qualified). In fact, Burden was later fired for not achieving much beyond what Lacey had done. Executive Vice President McKinney was then terminated for the same reason and in the same manner as Lacey (J.A. 357-59).

recitation of the facts involved in this case and his own testimony that he was a great carpet salesman. However, the reason respondent was fired was because he did not meet Carson's sales goals for Pittsburgh, did not sell carpet to the large Pittsburgh commercial market, and refused to actively promote Carson's National Sales Program.

Respondent knew that Carson's sales goal for him was $1.8 million (J.A. 501) and conceded that he was so told (J.A. 204), but considered his objective "a joke".[5] He also admitted that his commercial carpet sales for Carson were very weak: "I just probably

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[5]Respondent devotes considerable time to discussing the alleged sales "quota" challenge which was given by Carson annually to all salesmen. The "quota" he cites is the company's annual sales contest which it is undisputed was established by Carson to spur on its sales force through fair peer competition (J.A. 338), by applying an even across the board percentage of the previous year's volume to each salesman (J.A. 61-63). It was not based on "real world" views of sales volume expected of the individual salesmen by Carson in a particular territory. (J.A. 501-07, 590-600, 677-81).

never put enough effort into it. That wasn't my bailiwick." (J.A. 200).

Finally, in the Spring of 1981, Carson discovered that Lacey was not following the National Sales Program he was ordered to follow, because he was "wasting his time" with department store managers like Patsy Macioce rather than spending his time with the retail store buyers, and that many of his accounts had not been serviced or contacted in a long time. (J.A. 303, 393, 537). Moreover, no commercial sales of any consequence were achieved by Lacey at the time of his termination. (J.A. 196-200, 521). His April 1981 volume was "far below the number expected" by management (J.A. 535) (less than half what should have been produced that month), and 41% below what he sold in April 1980 (J.A. 536-37, 794).

Carson knew that based on the Survey of Buying Power Index, Pl.Ex. 25A, Lacey's sales territory, Allegheny County, should have been producing at least $3.5 million in

carpet sales and that as a carpet salesman, Lacey should have been selling three times the $1.9 million the resilient floor salesman in Allegheny County was able to sell. Yet, Lacey was only able to sell $1.2 million in 1980 even while the Pittsburgh office construction boom was demanding large amounts of office carpet.[6]

The critical issue here for the Court to decide is whether the basis for a business decision by Carson, right or wrong on the facts, can be reviewed by a jury on

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[6]Lacey colors his performance at the Carson Regional office in relation to sales performance figures achieved by other personnel. Respondents' Pittsburgh territory was the only Metropolitan area in the Region and had more opportunities for sales than available to salesmen in rural regions. Therefore, he realistically had to do better than other salespersons in the home region. Moreover, the fact that Lacey's replacement, Mr. Burden, equaled Lacey's sales without having had years to develop the market as Lacey might have had, reflects that the market was not being aggressively pursued by Lacey. Lacey's objection that his boss, Frank Rodzwicz, was not fired at the moment Lacey was, also hides the fact that Rodzwicz was fired for the same reason as Lacey, poor performance, three months later.

evidence by the alleged victim of age discrimination that he was simply a good worker. Here, Carson's Executive Vice President McKinney testified he reluctantly made the decision to terminate Lacey on the basis of economic data, continuous losses of the Company in Lacey's territory, and the advice of his sales managers that they had exhausted efforts to motivate Lacey to perform at the level required by its national sales strategy.[7] (J.A. 355). None of these reasons made by the key individual, McKin-

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[7]Lacey argues he was not given a written warning according to Carson's policy. The unrebutted evidence was that the "policy" Lacey presented at trial was used only in Carson's retail stores division in Chicago, but not used in the division floor covering sales force. (J.A. 357, 693) No Carson floor covering employee ever received any of the appraisals or disciplinary devices set out for the larger and centrally organized retail workforce (J.A. 356-7, 693). Respondent cannot disclaim receiving a verbal ultimatum by his sales manager to achieve or be replaced. (J.A. 212, 216). To increase its market share, Carson experienced a large turnover in salesmen in Pittsburgh, most lasting only a few years, like Lacey. (J.A. 349-50, 367, 507).

ney, who made the decision to discharge were controverted as not the actual reasons relied upon at trial. Like the events in Dorsch v. L.B. Foster Co., 782 F.2d 1421, 1425 (7th Cir. 1986), congratulatory notes and the winning of sales contests do not constitute evidence of sufficiently developing sales according to the duties required by management for the job.

Under the ADEA, respondent's position unfolds on Carson's stated reason that he "did not sell enough display rack and automatic sampling programs. Considering his overall sales performances, such an averment is shallow, even if true." Opp. at 22. Management at Carson is entitled to base its decision to discharge employees for failure to follow its sales program. A mistake as to the underlying facts of the decision does not transform the matter into a case of age discrimination. "Age must 'make a difference' between termination and retention." Cancellier v. Federated Dept. Stores, 672

F.2d 1312, 1316 (9th Cir. 1982), cert. denied, 459 U.S. 859 (1982).

Finally, Lacey contends that he tried to mitigate damages by subscribing to "two trade journals", and talking to "sources of whom he personally had knowledge . . . they didn't know anybody that was hiring anybody", but admits that he "finally abandoned his search" in 1983. (J.A. 109) (Opp. at 9). This grapevine approach set forth more fully in the Petition at 48-52 does not satisfy any reasonable search efforts established under NLRB v. Madison Courier, Inc., 505 F.2d 391, 395 (D.C. Cir. 1974). Lacey's further admission to the Court that he "abandoned his search for employment in 1983," Opp. at 10, at least three years before trial also fails to conform to this Court's enunciated policy to promote employment. Phelps Dodge Corp. v. NLRB, 313 U.S.

177, 200 (1941).[8]

As a life-long salesman, it is difficult to reconcile the alleged fact that between 1981 and the trial in 1986, there were no sales jobs (even outside the carpet industry) in Pittsburgh he might have been able to acquire if he had continued to look. His contemporary, Rodzwicz, obtained a sales position in the carpet industry shortly after he was terminated by Carson. At some point in time, Lacey was required to "lower his sights" in order to satisfy his affirmative duty to mitigate damages.[9] Abandonment

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[8]At footnote 7, Opp. at 27, respondent contends that Carson argued in the Third Circuit that no award of back pay or front pay after 1983 should have been awarded to Lacey. In Lacey's deposition before trial in 1983, read into evidence, he testified that he pursued no jobs after receiving social security benefits in July 1981 (J.A. 176-81). He also testified he made telephone calls to only four firms in 1981 (J.A. 194-95). At trial, he stated his search efforts ceased in 1983, and not 1981 (J.A. 174).

[9]Corroborative testimony was also introduced from two Social Security Administration personnel that Lacey had put in writing to the agency in February, 1981 that (continued...)

does not meet this test.

Finally, respondent has not disputed that a clear conflict in the circuits is presented between the present case concerning the award of front pay by the jury and the Second Circuit in Dominic v. Consolidated Edison Co., 822 F.2d 1249 (2d Cir. 1987), that front pay is an equitable matter reserved to the trial judge. Here, the trial judge made no finding that Lacey could not be reinstated, but he would have if Carson's jury instructions were accepted. In light of the inability of respondent to face the issue presented in the petition, the need for plenary review of the action below is indisputable.

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[9](...continued)
he "will retire 7/1/81" (J.A. 154). No person is asked to fill out a formal application for benefits if all they want to obtain is information on benefit levels (J.A. 409, 417). Lacey's request for extra time from Carson in March 1981 to keep his old car longer before purchasing a new one, as required by company policy, is also consistent with his intention to retire in July 1981 (J.A. 67-70).

CONCLUSION

The inevitability of this Court receiving litigation over the issues presented here will continue until the instant dispute under the ADEA is resolved. Petitioner respectfully requests that the writ of certiorari be granted.

Respectfully submitted,

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